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No. 82-738

In The
Supreme Court of the United States
October Term, 1983

DR. ETHEL D. MIGRA,
Petitioner,

vs.

WARREN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE

Inasmuch as the factual posture of the case in the state court is critical to the determination of the issues before this Court, the petitioner must point out the serious inaccuracies in the respondents' statements of the facts in two respects, neither of which has any support in the record of the case. There was no official discussion

by the Board of Education in its consideration of the petitioner's continued employment, first, about abolishing the position occupied by the petitioner as Supervisor of Elementary Education, or second, about renewing petitioner's contract "solely as a courtesy to the petitioner, on the understanding that she would be submitting her resignation, which she did not do." On the contrary, the state trial judge found unequivocally that "[T]he defendant board in its resolution of April 17, 1979, approved the renewal of a limited contract with the plaintiff for the 1979-80 school year as Supervisor of Elementary Education for the Warren City School District, . . . (see Joint Exhibit A; p. 65 of Dr. Migra's transcript)." (App. pp. 30-32; 47, 48.) Thus, the respondents improperly assert as "facts" certain matters which are not facts at all, but self-serving statements of the respondents.

Under Ohio Law Dismissal Of An Action Without Prejudice By Order Of The Court Upon Motion Of The Plaintiff Is Not An Adjudication On The Merits, And, Hence, Does Not Act As A Bar To A Subsequent Suit.

The Full Faith and Credit Statute, 28 U. S. C., 1738 (1976), requires a federal court to give the state court dismissal order the same res judicata effect as would be provided by Ohio courts. Thus, if the state court order is not a final adjudication on the merits, and, therefore, is not treated as res judicata by the state court, a subsequent suit on the same claim is not barred by the doctrine of res judicata. In Ohio, only a final order on the merits is a complete bar to any subsequent action upon the same cause of action between the parties or their privies. *Norwood v. McDonald,* (1943) 142 Ohio St. 299, paragraph one of the syllabus.

The present suit involves parties in addition to the state court defendants, and raises civil rights claims which are being brought for the first time against all of the respondents. The state court complaint asserted two separate and distinct claims, (1) against the school board as a legal entity, and (2) against three of the individual respondents in this action. The respondent board was charged with the wrongful termination of the petitioner in violation of the statutory law of the State. As an additional claim, the petitioner alleged that the individual defendants conspired to deprive her of the position of Supervisor of Elementary Education which she had held for several years in the school district. This tort claim was separated by the trial court, sua sponte, and subsequently dismissed without prejudice by the order of the court at the petitioner's request.

In view of this posture of the state court proceedings, the question arises whether Ohio law would have precluded the petitioner from instituting any further action against the state court defendants on the tort claim which had been dismissed, or on any other action against the same or other parties based upon such tort. Stated otherwise, is the petitioner precluded from pursuing the civil rights claims in this case as a result of the proceedings in the state court?

It is clear from a perusal of Ohio cases that a voluntary dismissal without prejudice has always been considered not to be an adjudication on the merits, not to prejudice the case of the party in whose favor it is entered, and not to act as a bar to a subsequent suit on the same issues. The latest affirmation of this principle was de-

clared by the Supreme Court of Ohio in 1982 in the case of *Chadwick v. Barba Lou, Inc.*, 69 Ohio St. 2d 222, 431 N. E. 2d — (1982). Chadwick was a personal injury suit. Prior to the commencement of the trial of the case plaintiff moved for a continuance due to the absence of an important witness. The court denied the motion to continue but confronted the plaintiff with the alternatives of (1) having the sheriff bring in the witness, or (2) dismissing the case and filing it later. Upon plaintiff's decision to pursue the latter, the following entry was signed by the judge and journalized: "Upon motion of the plaintiff, the within action is dismissed without prejudice to further action. . . ." Within a week thereafter, the plaintiff instituted a new action, which was immediately challenged by the defendant on the ground that it was barred by the statute of limitation. The court overruled the defendant's motion to dismiss, for the reason that the savings statute, Ohio Revised Code, 2305.19, applied.[1] This statute provides, in part:

> In an action commenced . . . if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of . . . failure has expired, the plaintiff . . . may commence a new action within one year after such date.

Although the issue in *Chadwick* revolved about the application of the aforesaid savings statute, the court, in reality, was faced with the issue concerning the preclusive effect of the prior dismissal on the subsequent action. In this respect, the Ohio Supreme Court declared (p. 224):

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[1]The defendant also filed a motion for a judgment notwithstanding the verdict which was granted.

> Since the adoption of the Rules of Civil Procedure the dismissals of actions is governed by Civ. R. 41. Civ. R. 41 (A) governs dismissals initiated by the plaintiff. Under Civ. R. 41 (A) (1) (a) the plaintiff may, in absence of a dependent counterclaim, unilaterally dismiss his action before the commencement of trial simply by filing a notice of dismissal. Civ. R. 41 (A) (1) (b) authorizes the dismissal of actions by stipulation of all parties. A dismissal under Civ. R. 41 (A) (1), whether by notice or stipulation, is without prejudice "[u]nless otherwise stated in the notice of dismissal or stipulation." Civ. R. 41 (A) (2) provides for the dismissal of actions by order of the court upon plaintiff's motion to dismiss. Such dismissal is subject to "such terms and conditions as the court deems proper" and is, by express provision of the rule, a dismissal without prejudice unless otherwise specified in the court's order.

The court went on to hold that dismissal "without prejudice" is one "otherwise than upon the merits" and, that an action dismissed "with prejudice" is vulnerable to the defense of *res judicata.* In support of its conclusion, the court, in footnote n. 4, referred to the definition of "without prejudice" found in *Black's Law Dictionary,* (5th Ed.), which states that when included in an order the words "show that the judicial act is not intended to be *res judicata* of the merits of the controversy." After declaring that, "Under Civ. R. 41 (A) (1) a plaintiff may only once unilaterally dismiss an action while reserving his right to refile," the court concluded that a subsequent dismissal by notice "operates as an adjudication upon the merits and is *res judicata.*" Chadwick enunciates established law in Ohio regarding the res judicata effect of the dismissal of the petitioner's tort claim by the state court. It is clear, therefore, that Ohio would not bar a subsequent lawsuit against the respondents under the circum-

stances of this case. Thus, the language and policies behind the full faith and credit statute would exhort a federal court to give the same effect to the state court order of dismissal of plaintiff's action in the state court as is required by the rendering state, namely, that the petitioner's subsequent action is not barred under any principle of claim preclusion.

Respondents have conceded that petitioner's claim against the respondents for conspiring to interfere with her employment is not barred by Ohio res judicata law. See RB at 20-21. They argue, however, that this action is barred by a four year statute of limitations.[2] That issue, of course, is not before this Court.[3] Respondents' agreement that a conspiracy claim against the school members is not barred from the Ohio state courts by res judicata fatally undermines their contention that a Section 1983 conspiracy claim against the same individuals for the same interference with the contract must be barred from federal court under Ohio rules of res judicata.

Petitioner Had Both A Statutory Claim Against The Respondent Board Of Education As An Entity, And A Distinctly Separate Civil Rights Action Against The Board And The Individual Respondents; And The Pursuance Of One Right Did Not Foreclose Action On The Other.

The civil rights suit in the present case is based upon separate and distinct claims from the cause of action in

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[2]Ohio Rev. Code, Section 2305.09.

[3]However, this Court has required that state tolling rules be utilized to ascertain when a cause of action accrued for statute of limitations purposes, see *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), and Ohio Supreme Court's decision in *Chadwick v. Barba Lou, Inc.* Under the Ohio "Savings Statute," a plaintiff ". . . may commence a new action within one year after . . ." his or her failure otherwise than upon the merits. Chadwick at page 662.

the state court. The federal complaint states independent claims arising from the invasion of the petitioner's constitutional rights. The radical difference in the two actions is readily apparent upon a scrutiny of the state court proceedings. The federal action seeks relief for harm distinct from the employment-termination issue adjudicated in the state court. There the petitioner challenged the authority of the board of education to discharge her on the basis of the statutory law of Ohio. In contrast, the petitioner here seeks relief for the violation of her federally secured rights. The state court judgment did not resolve questions of fact and issues of law germane to the federal civil rights claims.

It is inconceivable that the state court would, sua sponte, fragment the cause of action before it, and permit or encourage piecemeal litigation of issues which should have been resolved in the one action. It is undisputed that there is only a single cause of action for the invasion of one primary right. And, admittedly, all grounds upon which a single claim is based must be asserted and concluded in one action, on pain of being barred from a separate suit. But the critical factor is the harm suffered—that the same facts may be invoked in both suits is not conclusive. Petitioner's federal action seeks a different form of relief for a different wrong. The district court action was filed pursuant to 42 U. S. C., Sections 1983 and 1985, alleging a conspiracy to violate petitioner's First, Fifth and Fourteenth Amendments rights. The complaint alleges, in substance, that the respondents' actions amounted to an attack upon the academic freedom of the petitioner as a teacher, and unlawfully stigmatized the petitioner in violation of her liberty interest in her reputation

and deprived her of the property interest in continued school employment without due process of law.

The cases in which the courts have applied res judicata to "claims which could have been litigated" in a prior suit involve specific fact situations, and have limited authority. The respondents cite and rely heavily upon the decision of the Supreme Court of Ohio in *Johnson's Island, Inc. v. Board of Township Trustees*, 69 Ohio St. 2d 241, 431 N. E. 2d 672 (1982), to support their argument that current Ohio law would preclude the litigation of the petitioner's instant federal action. Johnson's Island was decided on the peculiar fact situation of the case.

In *Johnson's Island*, a party who was previously defeated on its claim of exemption from a zoning regulation attempted to gain relief on the same issue in a second lawsuit and thereby avoid the effect of the first judgment. The Ohio Supreme Court applied *res judicata* in refusing to allow this collateral attack, explaining that[4] "[t]his principle accommodates the finality of judgments."[5] See also *Stromberg v. Board of Education of Bratenahl*, 64 Ohio St. 2d 98, at 1186. Thus the court applied transactional *defense* preclusion, preventing the defendants from

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[4]Respondent relies (R.B. at 16) on language from *Anderson v. Richards*, 173 Ohio St. 50, 53, 179 N. E. 2d 918, 921 (1962), that a final judgment forecloses a party "from later attempting to reopen [her] case. . . ." In *Anderson*, like *Johnson's Island* but completely unlike petitioner's case, a defeated party sought a rehearing on the same issues previously litigated. *Anderson, supra*, at 920.

[5]The minority opinion, with three justices dissenting, felt that the case involved the doctrine of collateral estoppel and not res judicata (p. 250).

asserting as claims matters that could have been asserted as defenses in a prior action.

The issue of the definition of cause of action for *res judicata* purposes was not addressed by the *Johnson's Island* majority, who were concerned only with furthering the state's interest in protecting the validity of the previous judgment.[6] *Johnson's Island, supra,* at p. 675. Although respondents characterize the two dissents in *Johnson's Island,* a 4-3 decision, as resolving "any doubts one might have" that Ohio has "openly adopted" a new definition of *cause of action,* R.B. at 17, the three dissenting justices focused on their disagreement with the majority's conclusion on privity. *Johnson's Island* at 678-679 (Wm. B. Brown, dissenting); *id.* at 679, 680 (C. F. Brown, dissenting). Although one dissent did argue that the suit could be considered a separate cause of action with different proof requirements, *id.* at 678 (Wm. B. Brown, dissenting), his disagreement turned on the procedural positions of the parties in the two suits, and certainly could not and did not transform the majority decision into a *sub silentio* overruling of the traditional cause-of-action definition of *Norwood.*[7]

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[6]This policy is not implicated in petitioner's action, for she does not challenge the validity of her state court judgment.

[7]Even aside from this evidence of the continuing validity of the *Norwood* formulation, this Court should note that when the Ohio Supreme Court departs from past precedents, it does so specifically and explicitly in the official syllabus of a case. *See e. g., State of Cole,* 2 Ohio St. 3d 112, 443 N. E. 2d 169 (1982) (syllabus: Par. 2 of syllabus in *State v. Hester,* 45 Ohio St. 2d 71, 341 N. E. 2d 304 (1975), modified); *Anderson v. Richards,* 173 Ohio St. 50, 179 N. E. 2d 918, 919 (1962) (syllabus par. 2: ". . . *Jolley v. Martin Brother Box Co.,* 158 Ohio St. 416, 109 N. E. 2d 652 (1952), overruled)."

In the previous *Johnson's Island* litigation, the corporation which owned a limestone quarry on a site zoned for residential housing had been sued by a group of homeowners who sought to enjoin the operation of the quarry. As a defense, the corporation claimed that it was allowed a non-conforming use under the zoning ordinance, but the homeowners prevailed and the corporation was enjoined from operating the quarry. *Id.* at 673-74. Having failed as a defendant, the corporation brought suit as a plaintiff against the township, seeking to avoid the injunction by obtaining a declaratory judgment that the zoning ordinance was unconstitutional. *Id.* at 673. In rejecting this claim as barred by *res judicata*, the Ohio Supreme Court stated that as a *defendant* in the first suit, the corporation had been bound to raise "any defense which will exonerate [it] from liability, including a defense of the invalidity of the ordinance." *Id.* at 677. In a passage that refutes respondents' reading of *Johnson's Island*, however, the Court went on to indicate that had the corporation initiated the previous litigation to gain a declaratory judgment that it had a non-conforming use under the zoning ordinance, however, a second suit on the claim of unconstitutionality would *not* have been barred. *Id.* at 676-677. ("We find that there is a difference between those instances in which the landowner in the initial action was the party claiming the relief from the law, and instances in which the landowner was in a defensive position, as here."); *see also Jones v. Petruska*, 13 O. O. 3d 111 (1979) (variance application is separate cause of action relating to same subject matter).

The *Johnson's Island* decision is limited on its facts to situations involving the failure to raise a defense in a

prior action. It is noteworthy that in the *Johnson's Island* case the Supreme Court of Ohio cited and reaffirmed *Norwood v. McDonald* and the latest pronouncement of that court on the subject of preclusion as found in *Trautwein v. Sorgenfrei*, (1979), 58 Ohio St. 2d 493.

The other cases cited by respondents to support their contention that Ohio has adopted the single transaction definition, RB 17-18, reiterate the principle of finality of judgments but do not widen Ohio's definition of "cause of action." *See e. g., Universal Underwriters Insurance Co. v. Shuff*, 67 Ohio St. 2d 172, 423 N. E. 2d 417 (1981) (where jury absolved uninsured motorist from liability, court would not undermine that judgment by compelling motorist to submit to arbitration); *State v. Cole*, 2 Ohio St. 3d 112, 443 N. E. 2d 169 (1982) (petition for postconviction relief is "frivolous" and "fails to state a justiciable claim");[8] *Stromberg v. Board of Education*, 65 Ohio St. 2d 98, 413 N. E. 2d 1184 (1980) (dismisses *fourth* action brought to challenge dissolution of school district).[9]

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[8]In *Cole*, one of the "exceptions to the absolute application of the doctrine of *res judicata* cited by the Ohio Supreme Court was *State v. Hester*, 45 Ohio St. 2d 71, 341 N. E. 2d 305, 307 (1976) (no *res judicata* bar where "the record does not disclose that the issue . . . has been adjudicated"). *See also State ex rel. Ogan v. Teater*, 54 Ohio St. 2d 235, 375 N. E. 2d 1233, 1239 (1978) ("the issue of whether the board abused its discretion . . . could not have been a matter of res judicata with respect to respondent").

[9]In the third case in this line, brought in federal court, the Sixth Circuit had barred all claims as *res judicata* from Ohio State litigation *except* a claim that the dissolution of the school district was part of a conspiracy by the School Board to promote segregation which had not been previously raised. *Wilt v. State Board of Education*, 608 F. 2d 1126, 1129 (1979). Thus in applying Ohio *res judicata* rules the Sixth Circuit did not apply the "transactional" definition of cause of action to bar all later claims related to the same subject matter, but rather applied the traditional Ohio rule.

Petitioner Is Not Barred From Litigating In The Federal Court Section 1983 Damage Claims That Were Never Raised, Argued Or Decided Simply Because She Had An Opportunity To Raise The Claims In A Previous State Court Proceeding.

All the grounds which petitioner considered essential and that were required for the successful attack upon the board's action in discharging her were utilized in the state court. The state law issues upon which petitioner proceeded were adequate and sufficient to sustain her case. And, being mindful that the state court separated the count involving the tortious conduct of the individual defendants from the statutory claim regarding the validity of the termination, and proceeded to try the latter alone—without objection on the part of the defendants—it is clear that neither the defendants nor the court viewed the tort claim as one that should have been litigated in the same action with the statutory claims.

The record discloses that the only demand or claim in controversy which passed into judgment in the state court action, and which cannot be brought in litigation between the parties in proceedings at law, involved state law issues totally unrelated to the federal civil rights claims which are before the federal court. The jurisdiction of the state court had not been invoked by either party on the matter of the violation of petitioner's civil rights, and, therefore, the state court could not have considered and passed upon such federal claims. The petitioner could have submitted her federal claims to the state court for

resolution, but she did not.[10] Absent such a voluntary submission, and there being no legal mandate compelling presentation of petitioner's federal claims with her state claims in the state court, it is difficult to accept the propriety of the decisions below. In any event, the record is devoid of legal justification for the action of the district court.

Contrary to respondents' assertion, R. B. at 21, allowing this suit is in keeping with Ohio's policy of permitting separate causes of action which arise from the same subject matter, and is equitable, for "the purposes underlying the principle of *res judicata* [i. e., finality] would . . . not be served by barring litigation to determine the validity of the claims." *City of Cincinnati, ex rel. Crotty, v. Cincinnati,* (1977) 50 Ohio St. 2d 27, 361 N. E. 2d 1340, 1342; *see also United States v. LaFatch,* 556 F. 2d 82, 83 (6th Cir. 1977) ("the doctrine of *res judicata* should not be applied when it would result in manifest injustice to a party . . ."); *cf. Mercoid Corporation v. Mid-Continent Investment Company,* 320 U. S. 661, 669-670 (1943) (equity court will not use *res judicata* to foreclose a party from raising a new issue which is an important public

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[10] In *Macko v. Byron,* (1982), 555 F. Supp. 470, 480, the United States District Court for the Northern District of Ohio stated: ". . . [D]efendants assume that plaintiffs could have asserted their civil rights claim in the state action. . . . There appears, however, to be substantial dispute within Ohio's judicial system as to whether state courts will accept jurisdiction over federal civil rights claims. . . .

"It does not appear that the Ohio Supreme Court has resolved this conflict between its appellate circuits; this Court is ill-equipped to make such a sensitive policy decision involving the operations of the state's judicial system, and will decline to do so." (Citation omitted.)

interest). Where, as here, respondents are concededly subject to a state claim involving the same facts and evidence, the purposes for which Ohio has enacted its *res judicata* rules or indeed any *res judicata* purposes would not be furthered by barring the related federal claim. See Shapiro, "The Application of State Claim Preclusion Rules in a Federal Civil Rights Action," 10 *Ohio N. L. Rev.*, 222, 235 (1983).

Reasonable doubt as to what was decided by a prior judgment should be resolved against making it a bar to subsequent action. *Res judicata* should never be applied when it would result in depriving a party of access to a federal court in a case in which no court has ever ruled upon the party's federal claim for monetary damages due to constitutional violations. The application of *res judicata* to the federal claims of the petitioner would contravene an overriding public policy and result in manifest injustice to the petitioner. She does not argue here that the doctrine of *res judicata* never applies to a Section 1983 action. The petitioner challenges the application of the doctrine to this case, not its theoretical relevance to a Section 1983 claim.

The argument that a party must litigate his federal claims in conjunction with his state court action based on state law claims or be forever barred, is clearly antithetical to the established policy of the Civil Rights Act. This argument has been repeatedly rejected by this Court. Statement in the dissent of Justice Brennan in *Preiser v. Rodriguez*, 411 U. S. 475-513, 514, is especially enlightening:

> By enactment of the Ku, Klux Klan Act of 1871, and again by the Grant in 1875 of original federal question jurisdiction to the federal courts, Congress

recognized important interests in permitting a plaintiff to choose a federal forum in cases arising under federal law.

> "In thus expanding federal judicial power, Congress implied the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and the decision of his federal constitutional rights. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . . ." (Citations omitted.)

On June 13, 1983, the Court announced its decision in the case of *Haring, Lieutenant, Arlington County Police Department, et al., v. Prosise,* 51 LW 4736. In essence, the Court ruled that a conviction obtained in a state court upon a voluntary plea of guilty does not preclude the assertion of a claim for damages under 42 U. S. C., Section 1983 for an alleged Fourth Amendment violation that was never considered in state court proceedings. The Court held that the litigation of the Section 1983 claim is not barred because the party had an opportunity to raise his Fourth Amendment claim in the criminal prosecution. As the respondents have done in the instant case, the petitioners in *Haring v. Prosise* argued that the respondent should be barred from litigating an issue that was never raised, argued or decided, simply because he had an opportunity to raise the issue in a previous proceeding. This Court rejected such an argument, stating that "[T]here is no justification for creating such an anomalous rule." We believe this Court's rationale in *Haring v. Prosise,* as set forth in the following declaration, is especially appropriate and pertinent to the issues in the within cause.

Adoption of petitioners' rule of preclusion would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights. See *England v. Medical Examiners,* 375 U. S. 411, 416-417 (1964); *McClellan v. Carland,* 217 U. S. 268, 281 (1910); *Willcox v. Consolidated Gas Co.,* 212 U. S. 19, 40 (1909); *Cohens v. Virginia,* 19 U. S. 264, 404 (1821). Under petitioners' rule, whether or not a state judgment would be accorded preclusive effect by state courts, a federal court would be barred from entertaining a Section 1983 claim. The rule would require "an otherwise unwilling party to try [Fourth Amendment] questions to the hilt" and prevail in state court "in order to [preserve] the mere possibility" of later bringing a Section 1983 claim in federal court. *Brown v. Felsen,* 442 U. S., at 135. Defendants who have pleaded guilty and who wish to bring a Section 1983 claim would be forced to bring that claim in state court, if at all. Not only have petitioners failed to advance any compelling justification for a rule confining the litigation of constitutional claims to a state forum, but such a rule would be wholly contrary to one of the central concerns which motivated the enactment of Section 1983, namely, the "grave congressional concern that the state courts had been deficient in protecting federal rights." *Allen v. McCurry, supra,* at 98-99, citing *Mitchum v. Foster,* 407 U. S. 225, 241-242 (1972), and *Monroe v. Pape,* 365 U. S. 167, 180 (1961). See *Patsy v. Board of Regents,* 457 U. S. 496 (1982).

Thus, it follows from the clear and consistent pronouncements by this Court that the petitioner's state court action does not preclude her from seeking to recover

damages under 42 U. S. C., Section 1983, 1985, for the alleged federal constitutional violations that were never considered in the state proceedings.

Respectfully submitted,

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